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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 627.

ARY E. ZONNE, APPELLANT,

vs.

MINNEAPOLIS SYNDICATE, JOHN DE LAITTRE, TREASURER, AND J. FRANK CONKLIN, ASSISTANT TREASURER, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

APPELLANT'S REPLY TO BRIEF FOR THE UNITED STATES.

The Solicitor General filed a brief for the United States in this case on the 17th of January, 1911, a copy of which was received by the undersigned on the evening of that day. There is great merit in its brevity, enabling an even shorter reply.

1. The Solicitor General assumes (page 2) that the *Minneapolis Syndicate* was organized under the provisions of § 2846 of the Revised Laws of Minnesota of 1905, as *a trading company*. The corporation having been in existence "for many years," it is obvious that it was not organized under the Revised Laws of 1905, but it is true that its Articles of Incorporation were amended under the provisions of those Revised Laws, *not* as a trading company, but for *"other lawful business not otherwise provided for in this chapter."*

Whether it cannot lawfully exist as a corporation and have no power to engage in business of any kind whatever (as declared by the Solicitor General, at page 4), is, of course, a matter with which the State of Minnesota alone can be concerned, and need not be discussed here.

2. The argumentative force of italics is exemplified by their use on page 3 in emphasizing one of the declared powers of the corporation, to wit: To receive and distribute among its stockholders *the proceeds of any disposition of its land.*

We infer that this is deemed evidence of a power to carry on and do business. But, as has been pointed out heretofore, the carrying on or doing of business connotes something more than a single isolated act; it implies continuity of activity along some given line (Appellant's Brief, pp. 59-61; Supplemental Brief, page 5 (citing *Cooper Mfg. Co. vs. Ferguson*, 113 U. S., 727); pages 8-9 (citing *General Conference, etc., vs. Berkey*, 156 Cal., 466); page 19 (citing *Atlantic Postal Cable Co. vs. Mayor*, 133 Ga., 66); and

pages 20 *et seq.*—quoting from the opinions in *Smith vs. Anderson,* L. R., 15 Ch. Div., 247).

The very power thus appealed to indicates its limitation, inasmuch as the proceeds of any sale of the land cannot be reinvested, but *must be distributed* to and among the stockholders.

3. The Solicitor General states (page 4), that "there is presumptively some advantage in its doing its business of holding and leasing and conserving its property in the way it does, and of receiving and distributing, in its corporate capacity, the rents derived therefrom, or it would not so transact that business, and the self-imposed curtailments of its activities should not relieve it from its obligations to the Government with respect to those it retains."

This contention ignores the *sine qua non* of liability to taxation under the act of August 5, viz: that the corporation must be organized for profit.

Our position in respect of this is set out at pages 1-3 of our Supplemental Brief, and exemplified and sustained, with peculiar aptness, by the case of *Smith vs. Anderson,* referred to on page 20, *et seq.*

JOHN R. VAN DERLIP,
Solicitor for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

ARY E. ZONNE, APPELLANT,
v.
MINNEAPOLIS SYNDICATE, JOHN DE LAITTRE, treasurer, and J. Frank Conklin, assistant treasurer. } No. 627.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The above case attacks the validity of section 38 of the act of Congress approved August 5, 1909 (ch. 6, 36 Stat., 11, 112–117), known as "The Corporation Tax" enactment, but raises no questions concerning the constitutionality of the section in any respect different from those which have been fully considered in the principal briefs of the Government. The authorized activities of the Minneapolis Syndicate are much narrower than those of any of the other corporations before the court. In fact, the present case was evidently designed to present the example of a corporation which has something, but does nothing, and so is not subject to the tax.

The Minneapolis Syndicate was organized under the statutes of Minnesota, and the bill does not state, but we assume from a reading of the statutes, as a trading company under the provisions of section 2846 of the Revised Laws of 1905.

This is the section (p. 565):

> 2846. Trading companies, etc.—Corporations may be formed for any of the following purposes:
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> 1. Constructing, leasing, or operating docks, warehouses, elevators, public halls, or hotels.
>
> 2. Carrying on any kind of lumbering, agricultural, dairying, mercantile, chemical, transportation, or other lawful business not otherwise provided for in this chapter.
>
> 3. Buying, selling, and improving lands and tenements.

The bill does not inform us when the company was organized, but does allege that it has been in existence for many years. Its original articles of incorporation are not set forth, nor are its original powers stated. We are informed that it acquired the west half of block 87 in the city of Minneapolis, and we may presume that it constructed a large building thereon. For a time it was engaged in letting offices and stores in this building and in collecting rents therefrom, but on December 27, 1906, it leased the entire property for a term of 130 years to Arthur Lyman and Russell Tyson as trustees at an annual rental of $61,000. The terms of this lease are not stated, and neither are the terms of the trust. The bill then proceeds (R., 2, 3):

* * * that at the time of the execution and delivery of said lease, said corporation sold and conveyed and delivered possession of said building, and has not since owned, or does not now, own, control, occupy or let the same, or any part thereof, and that the entire property now owned by said corporation consists in the above-described tracts, lots or parcels of land which have been leased as aforesaid; that after the making of said lease, and by reason thereof, said corporation ceased to do business or to be a corporation organized for profit, and thereupon caused its articles of incorporation to be duly amended in pursuance of the statutes of the state of Minnesota, so that the sole purpose and object of the existence of said corporation became and is as stated in said amended articles of incorporation, to-wit:

"The sole purpose of the corporation shall be to hold the title to the westerly one-half of Block 87 of the Town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of one hundred and thirty (130) years from January 1, 1907, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, *and the proceeds of any disposition of said land.*" (*Our italics.*)

That the only income of said corporation since the first day of January, 1907, has been the rental paid to it under said lease, and that said corporation, since said last named date, has engaged in no business of any kind whatsoever, and under its said amended articles of

incorporation, said incorporation has no power to engage in any such business.

It is to be noted that the bill does not disclose when the articles of incorporation were amended, and for aught that appears it may have been after the company became liable for the tax.

There was here an obvious effort to strip the corporation of everything like a business purpose, and to leave it a mere entity without any function to perform. But this corporation can live only by virtue of the statute we have quoted, and if it divests itself of every business purpose and function, if it is not carrying out some one or more of the purposes specifically mentioned in section 2846 "or other lawful business not otherwise provided for" it can not live at all. It may dissolve, cease to be a corporation, but it can not exist as a corporation and have no power to engage "in business of any kind whatever."

By its own assertion it does exist as a corporation, and it does something. It holds property, it receives rents, distributes income, and is living enough to look after and to assert its rights and interests with respect to that property, and there is presumptively some advantage in its doing its business of holding and leasing and conserving its property in the way it does, and of receiving and distributing, in its corporate capacity, the rents derived therefrom, or it would not so transact that business, and the self-imposed curtailments of its activities should not

relieve it from its obligations to the Government with respect to those it retains. It has either succeeded in suicide, or it is still in business. If dead, it is beyond the reach of harm. If living, it is subject to all of life's duties. Its presence here as a litigant should be taken as at least *prima facie* evidence that it is not dead.

The tax is an excise to which a corporation is subjected with respect to the business done by it, measured by its income from all sources, as it was in *Pacific Insurance Company* v. *Soule*, 7 Wall., 433, and *Railroad Company* v. *Collector*, 100 U. S., 595, and this in no event nor to any extent makes the tax one upon property, for a corporation is organized to do something and not simply to exist, and it holds its property, not in mortmain, but as a means of, or an aid to, the accomplishment of that which it was organized to do. The activity of the company is not made the measure of the tax except as that may manifest itself in the income, and on the other hand, that sloth is not made a reason for deduction from the measure can not be a valid objection to the propriety of that measure.

We respectfully submit that the decree of the Circuit Court should be affirmed.

FREDERICK W. LEHMANN,
Solicitor General.

JANUARY, 1911.

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